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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MARIO THOMAS AZAMA, Defendant and Appellant.	C061156 (Super. Ct. No. 07F09525)

A jury found defendant Mario Thomas Azama guilty of three counts of second degree robbery (Pen. Code, § 211),[1] carjacking (*id.*, § 215, subd. (a)), vehicle theft (Veh. Code, § 10851, subd. (a)), and receiving stolen property (Pen. Code, § 496, subd. (a) [hereafter § 496(a)]). The jury also found that defendant personally used a handgun in committing each of the felonies except for the crime of receiving stolen property. (*Id.*, §§ 12022.53, subd. (b), 12022.5, subd. (a)(1).) Of the five firearm enhancements, two were stayed pursuant to Penal

[1] Undesignated statutory references are to the Penal Code.

Code section 654. The trial court sentenced defendant to an aggregate term of 23 years eight months in state prison.

Defendant appeals, claiming there is insufficient evidence to support the firearm enhancements. In supplemental briefing, defendant contends the stolen property count must be reversed, because he could not lawfully be convicted of stealing and receiving the same property.

We shall strike the conviction for receiving stolen property, but otherwise affirm the judgment.

FACTUAL BACKGROUND

The Gallegos robbery

On August 12, 2007, at approximately 11:00 p.m., Miguel Gallegos pulled into an Arco gas station on 16th Street and W Street in Sacramento with his wife Lydia and their two-year-old son. While Gallegos sat in the driver's seat, Lydia began pumping gas and sat next to their son in the driver's side back seat.

As they waited for the gas to finish pumping, defendant approached the vehicle, lifted his shirt, and pulled out a black revolver. Defendant walked over to the driver's side window and Gallegos, who was familiar with guns, heard what "sounded like it was somebody pulling the hammer back." As defendant pointed the gun at the driver's side of the vehicle, the gun struck the door panel, making a noise that sounded like "metal hitting metal." Gallegos looked down and saw that the gun was "very clearly a revolver." He was "100 percent sure that [it] was a

gun" and believed that it was a ".45-caliber revolver." Defendant then said, "[D]id you hear what I just cocked back, my nigga?"

When Gallegos told defendant that he did not have a wallet, just the ATM card he was holding, defendant reached across the vehicle and grabbed Lydia's purse. Believing that her husband was going to die, Lydia began crying. Defendant responded, "[W]hat, bitch, I will fucking kill you." Before running away, defendant told Gallegos to put his ATM card in Lydia's purse, reached into the car and turned off the ignition, grabbed Gallegos's keys, and slammed the keys into the purse.

The Ryan robbery and carjacking

Later that night, at 3:00 a.m., Richard Ryan pulled into the same Arco gas station. As he finished pumping gas, Ryan saw defendant standing in front of him pointing a black gun.

Defendant directed Ryan to empty his pockets and surrender his keys. Believing that the gun was real because defendant "approached [him] with a gun [and] said things to [him] and acted in a manner to make [him] think it was a real gun," Ryan complied. He gave defendant his keys, driver's license, credit cards, and money. Defendant then told Ryan to run away and drove off in Ryan's 1994 Nissan Altima.

Defense

Defendant testified on his own behalf. While he admitted to committing both crimes, he claimed the weapon he used on each occasion was actually a "cigarette lighter" that "kind of looks

like a gun." According to defendant, the lighter was 12 to 13 inches long, dark gray, and made of metal. To operate the lighter, "you just cock the thing back [referring to the hammer] and a lighter comes out of the front." Defendant was not sure what happened to the lighter, but thought he may have left it in a drug house.

DISCUSSION

I. Sufficiency of Evidence to Support the Firearm Enhancements

Defendant claims that there is insufficient evidence to support the jury's findings that he used a firearm in committing the substantive offenses. The standard of appellate review is well settled: We must "review the whole record in the light most favorable to the judgment below . . . --that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We do not reweigh conflicting evidence or evaluate the credibility of witnesses. "'[I]t is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts. . . .'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Simply put, "[a]n appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*People v. Combs* (2004) 34 Cal.4th 821, 849, citing *People v. Rodriquez* (1999) 20 Cal.4th 1, 11.)

In this case, substantial evidence supports the jury's findings that defendant used a genuine firearm in committing the substantive offenses. In both robberies, defendant displayed an object that several witnesses described as a gun. Miguel Gallegos testified that he was "100 percent sure" the object in defendant's hand was a real firearm. Gallegos said it was "very clearly a revolver" and appeared to be a .45-caliber weapon. It also made a "metal hitting metal" sound when it struck against the vehicle's door panel. Gallegos's wife also believed that defendant displayed a gun, estimating that it was 11 or 12 inches long.

Defendant's words and actions provided additional circumstantial evidence to support the witnesses' direct testimony. During the robbery, defendant pulled the hammer of the gun back and asked Gallegos, "[D]id you hear what I just cocked back, my nigga?" Defendant also threatened to kill his wife when she began crying.

There was also sufficient evidence that defendant used a gun to rob Ryan. The Ryan robbery occurred only a short time after the Gallegos robbery at the same location. Ryan testified that "the whole gun was black" and that he could see the entire barrel. Defendant's former girlfriend testified that he possessed a revolver in July 2007.

Defendant, however, contends that his "testimony did set up a reasonable inference which the prosecution failed adequately to disprove." Essentially, he asserts that since both his

testimony and that of the prosecution witnesses gave rise to equally reasonable inferences, we must draw the inference most favorable to the defense.

Defendant fundamentally misunderstands the scope of review. Although the jury was entitled to reach a different verdict had it believed defendant's testimony, we have no power to disturb the jury's resolution of conflicting testimony. "'Questions as to the credibility of witnesses and the weight to be given their testimony are for the trier of the facts. . . . Although impeaching evidence in the nature of contradictions or otherwise has been received, it is still the right as well as the duty of the jury to determine to what extent they believe or disbelieve the testimony.'" (*People v. Cannon* (1947) 77 Cal.App.2d 678, 688.)

Our decision in *People v. Monjaras* (2008) 164 Cal.App.4th 1432 (*Monjaras*) conclusively refutes defendant's argument. There, a jury found Monjaras guilty of committing robbery, with a true finding that he personally used a firearm (§ 12022.53, subd. (b)). The evidence showed that he took a victim's purse after displaying a black pistol tucked in his waistband and saying, "'Bitch, give me your purse.'" (*Monjaras*, at p. 1434.) The victim could not say whether the pistol was a gun or toy. Although she did not know whether the pistol was plastic or metal, she "assumed" it was "real." (*Id.* at p. 1436.) On appeal, Monjaras claimed "'there was no evidence of a gun presented to the jury to support an inference the weapon was

real' and, thus, the firearm use enhancement must be reversed." (*Id.* at p. 1435.)

We disagreed, stating that circumstantial evidence alone was sufficient to support the firearm enhancement. (*Monjaras*, *supra*, 164 Cal.App.4th at p. 1436.) In affirming the judgment, we stated: "[W]hen as here a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm . . . . In other words, the victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm." (*Monjaras*, at p. 1437.)

The facts here are far stronger than in *Monjaras*. In this case, one witness testified he was "100 percent" certain that defendant displayed a revolver, and other witnesses testified that the object displayed attributes consistent with it being a real gun. This testimony, coupled with defendant's words and conduct during the robberies, provided abundant evidence to support the jury's finding that defendant used a gun rather than a cigarette lighter to rob his victims. The firearm enhancements may not be disturbed.

II. The Receiving Stolen Property Conviction--Count Six

The trial court imposed a two-year sentence for defendant's conviction of receiving stolen property under section 496(a), but stayed the sentence pursuant to section 654. In a

supplemental brief, defendant contends he cannot be convicted of both stealing Ryan's vehicle and receiving it as stolen property. The People concede this point and we agree.

Section 496(a), states that "no person may be convicted both pursuant to this section and of the theft of the same property." Our Supreme Court shed light on this language in *People v. Garza* (2005) 35 Cal.4th 866 (*Garza*). The court stated that where "a defendant's dual convictions for violating [Vehicle Code] section 10851[, subdivision] (a) and section 496(a) relate to the same stolen vehicle, the crucial issue usually will be whether the [Vehicle Code] section 10851[, subdivision] (a) conviction is for a theft or a nontheft offense. If the conviction is for the *taking* of the vehicle, with the intent to permanently deprive the owner of possession, then it is a theft conviction that bars a conviction of the same person under section 496(a) for receiving the same vehicle as stolen property. Dual convictions are permissible, however, if the [Vehicle Code] section 10851[, subdivision] (a) conviction is for posttheft driving of the vehicle." (*Garza*, at p. 881.)

The *Garza* court upheld dual convictions by finding significant evidence in the record to support the inference that defendant's conviction under Vehicle Code section 10851, subdivision (a) was a nontheft conviction for posttheft *driving*. (Garza, *supra*, 35 Cal.4th at p. 882.) No such inference can be drawn here.

While the information alleged that defendant did unlawfully "drive and take" Ryan's vehicle, the prosecutor's closing argument urged conviction only on a "taking" theory; he made no mention of driving. Moreover, the trial court's instructions on the elements of Vehicle Code section 10851 failed to tell the jury that it could convict for *either* "taking" or "driving" the vehicle. The jury verdict states that it found defendant guilty of "Vehicle *Theft*." (Italics added.) Finally, the jury found that defendant personally used a firearm in the course of violating Vehicle Code section 10851. While the evidence clearly showed that defendant used a gun in the course of *taking* Ryan's vehicle, there was no evidence to support a finding that he used a firearm in the course of driving it.

Accordingly, we conclude defendant cannot be convicted of both vehicle theft under Vehicle Code section 10851, subdivision (a) and receiving the same vehicle as stolen property under section 496(a). The latter section, by its own terms, requires that the conviction be stricken.[2]

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[2] Both parties represent that the stolen property conviction should be "reversed." We see no point in such a disposition. There are only two limited exceptions to the rule that a person cannot be convicted of both stealing and receiving the same property: "'(1) when the acts of receiving or concealment are completely divorced from the theft . . . , and (2) when the thief is a co-conspirator of the receiver.'" (*People v. Smith* (2007) 40 Cal.4th 483, 522, fn. 10, quoting *People v. Strong* (1994) 30 Cal.App.4th 366, 371, fn. 5.) Neither exception applies under the facts of this case. Because defendant's vehicle theft conviction precludes any future conviction for

III. Section 4019

The recent amendments to section 4019 do not entitle defendant to additional time credits, as he was committed in this case for "serious" felonies. (§ 4019, subds. (b)(2) & (c)(2); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) The second degree robbery and carjacking convictions are "serious felonies" (§ 1192.7, subd. (c)(19), (27)), as is the vehicle theft conviction, a felony in which defendant was found to have personally used a firearm (§ 1192.7, subd. (c)(8)). Defendant's convictions and firearm use enhancements preclude additional conduct credits.

DISPOSITION

The judgment is modified to strike defendant's conviction for violating section 496(a)--count six. In all other respects, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

RAYE, Acting P. J.

ROBIE, J.

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receiving the same vehicle as stolen property, we see no reason to order a general reversal, which would permit a retrial. The proper remedy is to strike the conviction altogether. (Cf. *People v. Womack* (1995) 40 Cal.App.4th 926, 934.)